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Report of Roscoe Pound

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REPORT

OF

PROF. ROSCOE POUND

Upon Uniformity of Laws Governing the Establishment and Regulation of Corporations and Joint Stock Companies in the American Republics

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REPORT UPON UNIFORMITY OF LAWS GOVERNING THE ESTABLISHMENT AND REGULATION OF CORPORATIONS AND JOINT STOCK COMPANIES IN THE AMERICAN REPUBLICS.

ABSTRACT.

Although commerce and the instruments of commerce are universal, the laws governing them are local. This situation, of which business men justly complain, grows out of the history of law. But a distinction between commercial law, which meets universal needs, and civil law, which meets local needs, is recognized in the law of continental Europe and of Latin America by separate civil and commercial codes. It is recognized in the United States to some extent by judicial perception of the importance of uniformity of decision, as among the States, on commercial law and by the recent movement for uniform commercial legislation.

The law of Latin America on the subject of commercial associations is based ultimately on the French commercial code and later French legislation. It proceeds from the mercantile view of a business partnership and treats the share company as a commercial development thereof. Anglo-American law starts from the older conception that a business partnership is not a legal entity, and that legal personality is something specially conferred by the State through grant of a charter. Hence it sets up the commercial share company on the model of the municipal corporation or the great public-service company.

There are three fundamental differences between Latin-American and Anglo-American law on this subject: (1) The radical distinction between share companies and unincorporated associations made in Anglo-American law, whereas the law of Latin America treats all commercial associations under one general head; (2) the jealousy of the purely trading or business company in the United States, because it is assimilated to the great corporation or public-service company, to which such jealousy attached in the last century; (3) Anglo-American aversion to administration, so that we seek to regulate the organization and the conduct of commercial companies judicially, while Latin America deals with both administratively.

Five obstacles stand in the way of uniformity: (1) Local particularism; (2) the effect of the rise of legislation as the chief agency of lawmaking, since legislation promotes particularism; (3) the back-

wardness of the movement for uniform commercial law in the United States, fostered by the Anglo-American aversion to codification; (4) the division of jurisdiction between State and Federal Government in the United States, which commits commerce to the Nation and the instruments of commerce to the States; and (5) the Anglo-American aversion to doctrinal treatment of the law, without which we may not expect to bring about the conditions of uniformity.

Four conditions favor the attempt to promote uniformity: (1) The greater uniformity of commercial law because historically it proceeds from a universal law merchant; (2) the doctrinal movement for uniformity of law which is now strong among teachers of law in the United States; (3) the inherited universal ideas of the jurists of Latin America; (4) the sociological movement, strong throughout the world and particularly strong in the New World.

As first steps toward uniformity, two suggestions may be made: (1) Federal or even Pan-American representatives in the Conference of Commissioners on Uniform State Laws; (2) education of the public as to the importance of uniform commercial law and attempt to bridge the gap between the mercantile view of Latin America and the juristic view of Anglo-America through conferences and conventions.

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REPORT.

Commerce is universal, and the instruments of commerce, fashioned by its demands to meet its needs, are no less universal. But the laws that govern the different phases of this universal institution and regulate these universal instruments are local. This situation, to which the business man justly takes exception, since in practical effect it too often makes the law designed to secure the interests of a commercial and industrial society a means of defeating them, through imposing unnecessary restraints upon economic activity, results from the history of modern institutions. Law developed first, trade afterwards. For without the development of law the development of trade would have been impossible. Yet this very circumstance insured that legal institutions develop, without regard to the universal demands of commerce, to meet local conditions of life in noncommercial communities, and made it necessary to mold the legal institutions so developed, as well as might be after they were formative, to adapt them to the wider interests they were later called upon to secure. Just as we, at least, still measure in yards, feet, and inches, or tons, pounds, and ounces, or gallons, pints, and quarts, although the transactions calling for measurement have come to be cosmopolitan; as we still use local modes of reckoning

money in business which has become international; as we still use local languages, although the transactions requiring communication transcend local boundaries, so we still attempt to regulate the universal instruments of world-wide commerce by the local legal conceptions that have come down to each people from the past and the local legislation which each people enacts on the basis thereof.

Thus we find ourselves in the commercial world of to-day unable to deal with the cosmopolitan in a cosmopolitan way. Undoubtedly until the facts with which the civil law has to deal become world-wide, until the life of the local community becomes cosmopolitan, universal civil law, sought for by many authors in the immediate past, must remain a dream. But with respect to commercial law the case is very different. Grant, if one will, that administrative law, criminal law, the law of inheritance, the law of the family, and the law governing transfers of land rest upon positive foundations and arise from the will of the lawmaker, it must nevertheless be evident that the law of international transportation, the law governing sales between buyers and sellers in different lands, and the law governing the organization and control of the entities through which alone business may be carried on in the modern world must needs be in large part a recognition by each State of the usages of world-wide trade to which each State ought to make its local regulations conform.

Civil law, as its name implies, must in its details, at least, be local. It deals with matters of local moment. It subserves local needs. Commercial law, on the other hand, deals with matters of world-wide moment. It subserves universal needs. In consequence, to achieve its end, it must be more or less universal. This distinction is recognized in the countries of continental Europe by separate civil and commercial codes. It is recognized to some extent in the United States in the doctrine of the Federal Supreme Court that questions of commercial law are matters of "general jurisprudence." It is recognized to some extent in decisions of State courts in the United States in which the doctrine of the binding authority of precedent is relaxed where necessary to bring decisions upon questions of commercial law into harmony with the general course of decision in other States. It is coming to be recognized in legislation in the United States in the movement for uniform State laws upon commercial subjects. Thus, although many circumstances have tended to make commercial law only less provincial than the civil law, both in Latin America and in Anglo-America there are the foundations of universality and there is a certain disposition to take a universal view of matters of commercial law. In consequence it is not chimerical to consider how far uniformity of laws governing the most important of all instruments of commerce—the legal entities by means of which the large enter-

prises of modern business are carried on—may be hoped for, what obstacles are in its way, and how it may be promoted.

Four points will be taken up in order: (1) What, in general outline are the systems of law with reference to the legal entities by which modern business is carried on, in force in the republics of America; (2) wherein and why do they differ; (3) what are the chief hindrances to removal of the differences and the bringing about of uniformity; (4) what are the best means of bringing about such uniformity?

I.

Two systems of law on this subject obtain—one in Latin America, the other in Anglo-America. The former has its roots in the juristic tradition of Continental Europe and so ultimately in the Roman law. The latter has its roots in the Anglo-American judicial tradition and so ultimately in the old common law of England. Thus there is a general uniformity in Latin America and a general uniformity in Anglo-America, though in each case more or less difference of detail may have developed in particular jurisdictions. The French commercial code of 1807 and subsequent French legislation have furnished the model for the Roman-law world in this as in so many other cases. Hence it will be convenient to indicate in outline the kind of partnerships and companies recognized in the French commercial law. These are three: (*a*) The ordinary or unlimited partnership (société en nom collectif), (*b*) the limited partnership (société en commandité), and (*c*) the company, or, as we might say, share company, or, in American parlance, business corporation (société anonyme). The unlimited partnership is without the scope of this report and calls for no comment. The limited partnership is of two sorts: (1) The simple limited partnership (société en commandité simple) and (2) the limited partnership with shares (société en commandité par actions). In the former two or more persons responsible to the extent of their entire assets who manage the business, so far as relates to the outside world, are associated with one or more dormant partners, liable only to the extent of their interest as shown, not by shares but by the partnership articles. In the latter there are managers, or, as they might well be called in our parlance, "directors," with unlimited liability, and shareholders with limited liability, whose interests are secured by a committee of inspectors. The company or share company (société anonyme) corresponds in every way to the English company and to the business corporation of the United States.

It will be instructive to compare the foregoing with the German law. In Germany commercial partnerships (or better, associations)

are of three sorts: (*a*) unlimited (offene) partnerships; (*b*) commandite partnerships, which may be either simple or with shares; (*c*) share companies (Aktiengesellschaften). To these custom or legislation have added joint-adventure partnerships, registered associations, and partnerships with limited liability as to all members.

If we turn now to the commercial codes of Latin America we find the same system. The commercial codes of Chile and of Colombia, for example, expressly set forth that the legal entities of commercial law aside from natural persons shall be: (*a*) the unlimited partnership (sociedad collectiva); (*b*) the company (sociedad anónima); (*c*) the limited partnership (sociedad en commandita); and (*d*) the joint adventure (asociacion ó cuentas en participacion). In other cases, as in the commercial code of Argentina without any express enumeration, we find the same institutions recognized and provided for. Thus it becomes apparent that the law of Latin America on the subject in hand follows the same lines as the law of continental Europe, and that its most significant feature is the treatment of all kinds of mercantile associations under one general head and a conception of the share company (or corporation, as we should call it in the United States) as a mercantile development of the commercial partnership. This results in a relatively simple process of organization on the model of the organization of a mercantile partnership.

Turning to the Anglo-American law, we come at the outset upon a wholly different conception. Whereas the commercial code of Chile art. 348) and of Mexico (art. 90), for example, expressly declare the ordinary unlimited trading partnership to be a juristic person, it has been taken to be fundamental where the English law prevails that a partnership was not a legal entity, and that legal personality was something conferred specially by the Sovereign through grant of a charter or, in modern times, acquired under provisions of a general law by adopting articles or filing a certificate which, in connection with the terms of the general law, we still significantly call a charter. In other words, we distinguish sharply between the partnership to which, although it has most if not all of the attributes of the commercial as contrasted with the civil partnership of continental Europe, we refuse to concede legal personality, and the corporation, which alone we think of as a juristic person. The model upon which this institution is fashioned is the municipal corporation chartered by the Crown, or the great public-service company chartered by Parliament. Hence, although we have done much to simplify the mode of incorporation, it still smacks of the formality and dignity of the legislative setting up of something of great public moment, even if in fact there is nothing but an every-day private trading company.

II.

Passing to the differences between the two systems and their causes, the first and most significant has already been mentioned, but deserves further consideration. Latin America subscribes to the mercantile view of the nature of a commercial partnership. Thus a consistent scheme of business associations, from the ordinary firm to the share company at the other extreme, becomes possible. If the distinction between a civil and a commercial partnership seems unfortunate, yet that concession to history does no harm in commercial law, and is fast disappearing with the tendency to unite the civil and commercial in one body of law. In the United States, on the other hand, the steadfast refusal of legal theory to adopt the mercantile theory of a partnership, the obstinate adherence to the results of the historical accident that turned the jurists of ancient Rome to the analogy of the consortium of coheirs when they first had to do with the trading partnership, and the resulting gulf between one type of mercantile association and the other, are now made worse by the newly proposed uniform partnership act. This act, while in substance treating the commercial partnership as an entity, expressly refuses to recognize the settled view of the commercial world. Thus a formidable obstacle is put in the way of any rapprochement between the law of companies and mercantile associations in Latin-American and Anglo-American legislation.

A second difference closely connected with the first is the jealousy of purely trading or business companies so prominent in legislation in the majority of the United States for purely historical reasons. We think of a purely mercantile company not as a development of the mercantile partnership in view of the exigencies of business, but as something which typically is specially chartered by the government—as a dangerous agency which the state must hold down on every hand lest it do mischief. In practice this often results in impossible restrictions upon the commercial activity of the community, so that business men are compelled to go away from home to incorporate. It grows out of applying to the ordinary trading company ideas appropriate to the great corporation, such as the public-service company of to-day, and transfer thereto of the traditional jealousy of corporations in our common law. In the Roman law also there is a traditional jealousy of associations. But in comparison this has left little mark upon the commercial law of continental Europe.

A third difference grows out of the divergent attitude toward administrative supervision in North and South America. The Anglo-American polity is averse to and jealous of administration. Our common law seeks to regulate the conduct of corporations judicially by proceedings in quo warranto, by criminal prosecutions, and by

suits in equity. Most of our States do not supervise the formation of corporations at all, but rely on legal proceedings afterwards to enforce the provisions of the law. Where the formation of corporations is supervised, usually the supervision is exercised through a judicial proceeding. South and Central America, on the other hand, have inherited an administrative tradition and have subjected these matters systematically to administrative control.

III.

Five considerable obstacles to unification of the law governing mercantile companies on the American Continent must be taken into account. First and most weighty is the local particularism which has become so marked a feature of legislation and even of judicial decision in the United States. It is not merely that the common-law lawyer is prone to believe that Anglo-American legal conceptions inhere in nature. All the circumstances of our partition of the administration of justice and of the field of legislation between State and Nation tend to make each State think of every peculiarity of its local law as something of intrinsic importance—as a precious possession. To a less extent this is true of the nations that have built their own law upon Roman foundations in modern times. The strength of the idea of nationality in the modern world must be reckoned with by every promoter of uniform law.

A second difficulty inherent in such a project is that the present is an era of legislation, and in all eras of legislation the imperative theory of law is dominant. The more that law comes to be felt to be merely positive, to be merely the command of the lawgiver, the more difficult it is to enforce universal considerations. Legislation always tends to produce localization in law. It lacks the check of universal theory which restrains jurists and judges. But the imperative theory of law goes along with the advance of legislation and with the triumph of centralized bureaucracy throughout the world, against which the common law in the United States is fighting a slow retreat. Unknown in Germany until the last quarter of the nineteenth century, the theory of law as will has waxed strong there with the growth of national legislation under the Empire. In England and the United States, the chief parliamentary countries of the world, the imperative theory has almost stood for legal science. Even in Latin countries the failure of ideals of law and government which subordinate the State and its agencies to law must necessarily make for the imperative theory. It is true with the improvement of legislative methods and the working out of scientific theories of legislation we may hope that a real jurisprudence of actualities may be brought about by means of statutes. Legislative investigations

through committees, the working out of measures in advance by associations and congresses and conferences are tending to give to legislatures a breadth of view as to the demands of society with respect to law which jurists or judges were not able to attain in the past. For a long time to come, however, while this relatively new agency of lawmaking is perfecting, we may be certain that legislation and the resulting imperative theory of law will work against universality. Not only will this attitude of lawyers and jurists prove a general factor against a project for uniform commercial law, but the Anglo-American repugnance to codification will prove especially formidable in the United States. As half of the American continent in point of territory and more than half in point of population is skeptical as to the efficacy of legislation as an organ of private law and does not regard codification as desirable, all schemes for the unification of commercial law must be framed in the light of the settled attitude of the Anglo-American common law.

A third obstacle will be encountered in the backwardness of the movement for uniform commercial law within the United States. Uniform commercial law is just beginning to be attained in the United States. It is less than a quarter of a century ago that the Conference of Commissioners on Uniform State Laws began its activities. As a result of its labors a uniform negotiable instruments law has been formulated, which has been adopted in a majority of States. But that law which was formulated many years since remains to be enacted in more than one State of importance in the commercial world. It has drafted a uniform warehouse receipts act which as yet has been adopted in but few States. Its uniform sales act has as yet no more than begun to be adopted. Attempts to enact these statutes in many States have failed, and for a long time to come it will require vigorous exertion on the part of those interested in the movement to secure even this beginning of a uniform commercial law within the United States.

A fourth difficulty will be found in the division of jurisdiction between State and Federal Government in the United States. The regulation of commerce is committed to the Federal Government; the regulation of the instruments of commerce is committed to the States. This is proving in practice a most inconvenient partition. For the purpose of uniform commercial law it permits the local interests of a single community to defeat the general commercial interests of the Nation.

The fifth obstacle is to be seen in the Anglo-American aversion to doctrinal treatment of the law. The natural-law idea has never been congenial to English-speaking peoples, and in consequence universality will not appeal to them with the same force with which

it appeals to those trained in Latin systems of jurisprudence. Not only this, but a genuine contempt for legal theory has always been more or less characteristic of the Anglo-American lawyer. Lord Esher thanked God that English law was not a science. Professor Dicey tells us that "jurisprudence stinks in the nostrils of a practicing barrister." The United States is preeminently the land of the business spirit. The business man has been for a generation our type and exemplar. Hence, not unnaturally, lawyers have come to be pure business men. They, too, have the business ideal of making their business pay. They, too, have been judged by the money they have made, not by the service they have done to justice and to legal science. Hence, among probably the most businesslike of all peoples, commercial law has lagged, and it is not too much to say that in point of legal procedure the United States is far behind all English-speaking peoples. But a generally diffused sense for sound legal theory must necessarily precede any useful or practicable scheme of uniform commercial law.

IV.

Are there, on the other hand, any conditions which favor an attempt to promote uniform legislation with respect to the instruments of commerce throughout the American Republics? To my mind, in view of the greater uniformity, to begin with, of commercial law, for historical reasons, which has already been adverted to, there are three factors of no mean importance which might make for the success of such a movement in America. The first is the doctrinal movement for unity of law which is now strong among the jurists and teachers of law in the United States. The judicial law-making power of Anglo-American courts, even more than the activities of 48 State legislatures, has been actively destroying the unity of our traditional common-law system in the United States. Jurists and teachers of law have become alarmed at the situation, and it is significant that the cry is strong for the teaching and studying of "general law." International law affords a striking example of the practical results which juristic theory may accomplish. The juristic movement for uniformity of law in the several States of the Union can not fail to result in a general feeling for universality in law wherever practicable and advantageous.

A second factor which should operate strongly in favor of any project for uniform commercial legislation throughout the American Continent is the more universal view of law to which jurists in Latin countries have always inclined. The fortunate ambiguity of *jus* and its analogues in the Latin tongues—droit, dirritto, derecho—which preserves the consciousness of a connection which the English *right* and

law, however conducive to clear thinking, tend to obscure, of itself makes for universality. But over and beyond this Latin America, much more than English America, is, as it were, a soil prepared for universality. It has inherited a universal tradition. The Spanish jurist moralists of the seventeenth century, while not the sole are yet the chiefest exponents of that conception of law as the embodiment of eternal justice which has always been our main reliance against the analytical conception of law as the command of a lawgiver. Suarez, for instance, includes in his discussion of law notions as far apart as the rules of games and the laws of economics. He felt that they were laws in that they expressed in some form an idea of right, in that they were concerned with some notion of justice, in that they had to do with an ethical conception prior to and above the rule or law in the stricter sense. This was the atmosphere in which international law grew up and without which it was impossible to have such a system. The recognition of political facts, coupled with ancient ideals of unity and the older notion of law as an eternal verity upon which these jurists insisted, has produced a mode of legal thinking wider and more universal than that which prevails in English-speaking countries and creates an atmosphere in which a universal commercial law may easily grow up.

A third condition which would favor any project for uniform commercial legislation in America is the sociological movement, strong the world over, but particularly strong and forceful in the active and progressive peoples of the New World. In jurisprudence this sociological movement has built upon and made rational and scientific the old notion of natural law. The appeal from purely legal reasoning to general considerations of utility, of justice and of adaptation to human activities which it involves, must make for universality. In insisting that we must not forget the end of the law in the means, in taking us back on every occasion to reason as contradistinguished from legal conceptions, this new version of natural law which we are calling sociological jurisprudence is a powerful force against the localizing tendencies of the imperative theory and of legislation.

It must be manifest that we may not expect to move rapidly. For some time, we may hope only to educate the public as to the importance of this subject. The great gulf between the mercantile view of Latin America and the traditional Anglo-American juristic conception must be bridged. The jealousies awakened at once by the term corporation, developed in the nineteenth century era of unregulated public service companies and unrestricted commercial activity, must be allayed. The distinction between commercial law, where the problems are universal, and what Continental Europe calls civil law, where there is often much to justify local particularism, must be

brought home to lawyers and lawgivers in the United States. The first step then would seem to be the promotion of uniformity from within in both the Latin and the Anglo-American group. To this end it may be expedient to have Federal or even Pan-American representatives in the Conference on Uniform State Laws, which is the chief factor for uniform commercial law in the United States. The second step must be education through scientific discussions in congresses and conventions, bringing out the needs of trade in particular localities and by comparison, enabling us to draw with assurance, the line between the particular and the universal. This will prepare the way rapidly for sound and practicable lawmaking. Out of such discussions there may well arise in the near future a Pan-American Conference on Uniform Commercial Legislation composed of jurists, practicing commercial lawyers and men of affairs in due proportion, to give us step by step a scheme of Pan-American legislation with respect to the establishment and regulation of corporations and joint stock companies engaged in commerce, which may be a model, not only to American legislators, but for the world. Nowhere else will the two rival legal systems of the world be so well balanced. Nowhere else will the analytical conceptions of the Anglo-American jurists and the universal, or, if you will, the natural-law conceptions of the Latin jurists, be so equally represented. With each to act as a check upon the other, with each system to throw light upon the other in the handling of concrete problems, we may not unreasonably expect great results.

ROSCOE POUND.